WEST VIRGINIA HIGHLANDS CONSERVANCY ET AL.

IBLA 95-633 Decided May 28, 1999

Appeal from a decision of the Regional Director, Appalachian Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement, on informal review of the decision of the OSM Charleston Field Office denying relief on a citizen's complaint.

Appeal Dismissed.

1. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Statement of Reasons

   Absent the entry by this Board of an order consolidating multiple appeals, each party is required to submit a complete set of documents for each appeal. If a party wishes to incorporate by reference documents and arguments submitted in other appeals, it must provide the Board with a copy of those submissions for inclusion in the record. When this is not done, the Board may disregard such documents and arguments.

2. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Mootness

   An appeal is properly dismissed where the issues raised have been definitively resolved and effective relief may no longer be provided by the Board and there is no credible showing that the issues involved, while capable of recurrence, will avoid future review.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for the West Virginia Highlands Conservancy and the National Wildlife Federation; Wade W. Massie, Esq., Abingdon, Virginia, for The Pittston Company; Sandra M. Lieberman, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On May 13, 1994, the West Virginia Highlands Conservancy (WVHC) and the National Wildlife Federation (NWF) filed a citizen's complaint with the Director, Charleston Field Office (CFO), Office of Surface Mining

Reclamation and Enforcement (OSM), requesting an inspection of the operations and records of the Pittston Coal Company (Pittston) and its affiliates in reference to various permits held by Glory Coal Company (Glory). 1/ The complaint asserted that Pittston "owned or controlled" Glory within the meaning of the applicable OSM regulations and that Glory was responsible for numerous violations of the state program for which Pittston was properly held accountable. The complaint continued by noting that, as a result of previous complaints filed by WVHC and NWF, the State of West Virginia and Pittston had entered into a settlement agreement which addressed a number of problems which the complainants had previously raised. 2/ However, WVHC and NWF asserted that "the state has refused to take any action with regard to the Pittston Company and/or its affiliate with regard to the large amount of AML [abandoned mine land] fees currently outstanding ($400,000 plus)." (Citizen's Complaint at 2.)

Given the outstanding uncollected AML fees, complainants argued that the State of West Virginia was required to block new permit applications filed by Pittston or its affiliates and "take other enforcement action." After recounting various arguments as to why they believed Pittston was responsible for numerous violations by Glory at the Flag Run and Dola mines, complainants opined that normally OSM would be required, under 30 U.S.C. ' 1271(a) (1994), to issue a 10-day notice to the State of West Virginia with respect to the unpaid AML fees. Complainants, however, arguing that the State of West Virginia had repeatedly failed to take action with respect to the AML fees, 3/ requested that OSM proceed under 30 U.S.C. ' 1271(b) (1994) to enforce the State program. See Citizen's Complaint at 6-8.

Additionally, complainants requested that OSM conduct an appropriate inspection of Pittston's permits and its ownership and control of the four Glory permits and, after affording Pittston an appropriate hearing, issue orders cancelling such permits as improvidently granted and impose permit blocking on Pittston until such time as Pittston either entered into abatement and permit plans or rebutted the presumption of control. Complainants

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1/ The relevant Glory permits involved are West Virginia Permit Nos. UO-314 and UO-745 (the Flag Run mine site) and UO-357 and UO-744 (the Dola mine site).

2/ OSM's handling of these previous complaints was challenged by complainants and docketed as IBLA 93-152 and IBLA 95-338. These appeals ultimately resulted in a decision styled West Virginia Highlands Conservancy, 136 IBLA 65 (1996). This decision is examined subsequently in the text of this opinion.

3/ The complaint asserted that, while West Virginia had acted on the information relating to Pittston's control of Glory as a basis for threatening to permit block actions based on identified environmental violations at the Dola site, it had refused to take any action with respect to unpaid AML fees because it deemed these to be a "federal matter" which did not affect the State. (Citizen's Complaint at 6-7.)

noted that "[i]n the process of taking such action, OSM should issue appropriate notices of violation or cessation orders and must assess civil penalties as required by the Surface Mining Act and the federal regulations." (Citizen's Complaint at 9.) Finally, complainants reiterated their request that OSM commence procedures under 30 U.S.C. ' 1271(b) (1994) and, if the State continued in its refusal to take appropriate action, complainants demanded that OSM proceed to substitute direct Federal enforcement of the permit block provisions of the approved state program. Id.

By letter dated June 17, 1994, counsel for OSM informed complainants that their complaint had been received by the CFO. In this letter, counsel noted that in an earlier complaint, filed on May 22, 1992, complainants had raised essentially the same issues and requested essentially the same relief. Counsel noted that OSM had refused the relief requested at that time based on OSM's interpretation of the injunction issued on February 24, 1992, by the United States District Court for the Western District of Virginia in a suit styled Pittston v. Lujan, No. 91-0006-A. This Order enjoined OSM from "direct[ly] or indirectly requiring Pittston or Clinchfield [4/] to abate unabated cessation orders, unpaid civil penalties, unpaid abandoned mine land fees, or forfeited state bonds which have heretofore been assessed against company which OSM alleges is owned or controlled by Pittston" unless Pittston was first afforded a due process hearing upon adequate notice and with specificity of the charges made against it. Counsel advised complainants that, in OSM's view, the complaint sought remedies which were barred by the court's injunction since the actions requested "would be tantamount to indirectly requiring Pittston to abate unpaid AML fees assessed against a company linked to Pittston by ownership or control." (Letter dated June 17, 1994, at 1.)

Counsel did advise complainants, however, that action was proceeding with respect to the collection of AML fees from Pittston. Thus, the letter noted:

> In any event, the Office of the Solicitor has made a determination that Pittston may be held directly liable for the AML fees, and is in the process of negotiating with Pittston for the payment of the outstanding AML fees assessed against Glory and other Pittston contractors. Substantial progress has been made. Recently, Pittston paid $118,842.00 in AML fees with respect to other operations incident to these negotiations. Nevertheless, such negotiations will not continue indefinitely. If it becomes apparent that these matters including Glory cannot be resolved, the agency will consider direct legal action.

(Letter dated June 17, 1994, at 2.) By letter to WVHC and NWF dated July 13, 1994, counsel for OSM confirmed that the June 17, 1994, letter should be considered to be the CFO response to their citizen's complaint.

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4/ Clinchfield Coal Company is a Pittston subsidiary which was involved with respect to the Glory mining program.

Approximately 9 months later, on April 10, 1995, WVHC and NWF sought informal review of the CFO determination as allowed by 30 C.F.R. ' 842.15(a). In this request, WVHC and NWF noted that the CFO decision "refuses to inspect or enforce in connection with delinquent abandoned mine land reclamation fees owed by Glory Coal Company." (Request for Informal Review at 1.) Insofar as this determination related to permit blocking and the initiation of improvidently issued permit procedures (30 C.F.R. ' 843.21) against Pittston, WVHC and NWF recognized that OSM was acting in reliance on its interpretation of the court injunction issued in Pittston v. Lujan, supra. While not conceding, in any way, the correctness of this interpretation, WVHC and NWF chose not to belabor the point and merely incorporated by reference their earlier arguments below.

The major thrust of their request for informal review was directed towards the issue of AML fees, which they characterized as "the refusal of the Charleston Field Office to take direct enforcement against Pittston for that company's failure to pay delinquent abandoned mine land reclamation fees attributable to coal that Glory mined for Pittston." (Request for Informal Review at 2.)

In brief, WVHC and NWF argued that, inasmuch as the Field Solicitor's response on behalf of OSM had admitted that Pittston could be held directly liable for the AML fees associated with the Glory operations, OSM was required, under established procedure, to issue a notice of violation (NOV) to Pittston, as operator of the Glory mine, for its failure to tender the AML fees. WVHC and NWF asserted that OSM's failure to so proceed was either violative of OSM's procedures or, if OSM's obligation were deemed discretionary, an abuse of discretion. See Request for Informal Review at 4.

By decision dated June 19, 1995, the Regional Director, Appalachian Regional Coordinating Center, affirmed the determination of the CFO. As an initial matter, the Regional Director noted that the requests which WVHC and NWF made to provide Pittston with an opportunity for a hearing on its ownership and control of Glory and to permit block Pittston because of the outstanding AML fees associated with Glory's activity had been considered and rejected in a previous citizen's complaint. Since WVHC and NWF had appealed these determinations to IBLA, the Regional Director held they were not subject to reconsideration by OSM at that time. See Decision at 1-2.

Insofar as other aspects of the appeal were concerned, the Regional Director noted that OSM had already informed Pittston of its presumed ownership and control of Glory and Pittston had, in fact, identified its presumed ownership and control of Glory in the permit applications of its affiliates and had entered into negotiations with OSM for the purpose of resolving unpaid Federal reclamation fees and civil penalties with respect to all of its contractors. See Decision at 2. The Regional Director declined to review the assertion that OSM was required to issue an NOV to Pittston as operator for failure to pay the AML fees, contending that this issue had not been presented in the citizen's complaint filed by WVHC and NWF with the CFO. Id.

In their appeal to this Board, WVHC and NWF reiterate the arguments they have pressed below. 5/ In particular, they argue that, once having determined that Pittston was liable for Glory's unpaid AML fees, OSM was required to issue an NOV under 30 C.F.R. ' 843.12, which would effectively bar issuance of any new permit under 30 C.F.R. ' 773.15(b)(1). See Statement of Reasons for Appeal (SOR) at 7-8. Appellants also argue that OSM's failure to act in this matter is in direct violation of OSM's own written procedures (citing OSM Directives System AML 15-1) which require issuance of an NOV in circumstances such as those presented in the Pittston case, and further argue that, even if OSM were deemed to have discretion in this matter, its failure to act should be adjudged an abuse of discretion. Id. at 8-9.

WVHC and NWF particularly attack the Regional Director's refusal to examine OSM's failure to issue an NOV on the ground that appellants had not sought this relief before the CFO. First of all, they assert that they had, in fact, both identified Pittston's fee delinquency as a violation and specifically requested issuance of "appropriate notices of violation or cessation orders." Second, they argued that, so long as they properly identified the failure of Pittston to pay the required AML fees, any appropriate relief was properly put at issue. See SOR at 10-16. Along these lines, appellants note that OSM apparently notified West Virginia of their complaint and was subsequently informed that, while West Virginia was taking action with respect to on-the-ground violations at the Glory site, it did not intend to proceed with respect to the AML fee allegations. WVHC and NWF assert that, once OSM was apprised of this fact, it was required, pursuant to 43 C.F.R. ' 842.11(b)(1), to conduct an immediate inspection.

In response, Pittston argues that either the appeal should be dismissed on the ground that appellants have no standing in the matter or that the decision below should be affirmed. Insofar as standing is concerned, Pittston contends that appellants have failed to show how they sustained any adverse affects (beyond those suffered by the public at large) from OSM's decision to defer action on the AML fee question pending on-going negotiations with Pittston, particularly inasmuch as any AML fees ultimately collected could not be used with reference to the Glory mine sites involved herein. 6/ See Pittston Answer at 3-5. Thus, Pittston contends

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5/ On the issue of proper interpretation of the District Court injunction in reference to permit blocking, appellants note that they have "exhaustively briefed the issue" in IBLA 93-152 and "to avoid repetition" they adopted by reference the arguments set forth in that appeal. See SOR at 6-7 n.5. In responding to appellants' SOR, OSM noted that appellants had incorporated these arguments by reference and OSM "hereby incorporates by reference the arguments set forth in response to the appeal in No. 93-152." (OSM Answer at 1 n.1.) No copies of these previous arguments, however, were provided to the Board for consideration with respect to the instant appeal. As explained below in the text of this decision, this is not proper practice.

6/ On this point, Pittston cites 30 U.S.C. ' 1234 (1994), which limits eligibility for disbursements from the AML funds to those lands and water "which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or

that, under the applicable regulation, 43 C.F.R. ' 4.1281, appellants failed to show standing to appeal and its appeal should be dismissed or, at a minimum, a hearing should be held on the question of appellants' standing.

With respect to the substance of the appeal, Pittston takes issue with appellants' claim that they raised the question of whether OSM should be required to take direct action against Pittston for collection of the AML fees before the CFO. Rather, Pittston characterizes appellants' initial claim as one which sought to have Pittston permit blocked because of Glory's failure to pay AML fees. Id. at 6. Since appellants failed to argue that OSM was required to take direct action against Pittston for Glory's failure to pay AML fees before the CFO, Pittston maintains that it could not raise this issue before the Regional Director, citing Patricia A. Marsh, 133 IBLA 372 (1995), and concludes that the Regional Director's refusal to entertain appellants' arguments on this point was correct.

OSM has filed its own response in opposition to the appeal, generally agreeing with the position taken by Pittston as to the substance of the appeal. 7/ Thus, OSM agrees with Pittston that WVHC and NWF failed to raise their request that OSM issue an NOV directly to Pittston as an "operator" of the Glory permits with the CFO. (OSM Answer at 4-6.) Moreover, OSM challenges appellants on their contention that, even assuming that the matter had been fairly raised before the CFO, OSM was required to issue an NOV to Pittston under the facts of this case. OSM notes that it

> is in the process of negotiating a comprehensive settlement with Pittston which will resolve all violations of Pittston's contractors, including the Glory AML fees. This agreement is very near to conclusion, and its execution will in fact render this appeal moot because the AML fees will be paid.
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> While OSM does not dispute its authority to issue an NOV to Pittston, it opposes petitioners' attempt to constrain the agency's discretion and to dictate policy. Because OSM is actively pursuing a viable remedy for collection of the AML fees, it is clearly acting within its discretion to evaluate the appropriateness and effectiveness of the available enforcement tools.

(OSM Answer at 6.)

WVHC and NWF subsequently responded to Pittston's request that a evidentiary hearing be held on the question of standing. See Appellants' Opposition Brief at 1-3. They noted that this question was already

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fn. 6 (continued)
left in an inadequate reclamation status prior to August 3, 1977" (emphasis supplied).

7/ OSM's Answer was directed solely to the substance of the WVHC and NWF appeal. It took no position as to their standing to pursue the appeal before this Board.

involved in their earlier appeal before the Board (IBLA 93-152) and that they had submitted declarations from their members assertedly showing both how they were affected by mining at the Glory sites as well as how they would be affected by failing to permit block Pittston at other sites. 8/ They suggested that the Board's decision therein would resolve the matter.

In response to this submission, Pittston pointed out that the instant appeal had not been consolidated with IBLA 93-152 and, regardless of whatever declarations had been submitted in that appeal, the present appeal was devoid of any showing of adverse affect. See Pittston's Reply at 1-2. In any event, Pittston noted that, even if one considered appellants' declarations filed in IBLA 93-152 in the context of the instant appeal, appellants had still failed to establish how they were adversely affected by OSM's alleged failure to collect AML fees. Id. at 3.

Two events occurring after the filing of the above documents bear on the proper disposition of the instant appeal. On June 26, 1996, this Board issued a decision in West Virginia Highlands Conservancy, 136 IBLA 65 (1996). In that decision, the Board essentially affirmed 9/ OSM's refusal to proceed against Pittston in light of the court injunction in Pittston v. Lujan, supra, holding that OSM's interpretation of the scope of the injunction was reasonable. Id. at 69. But, while this decision clearly resolved the question of the appropriateness of OSM's interpretation of the court injunction, it left unresolved the challenge to WVHC and NWF's standing since it merely denied Pittston's request for an evidentiary hearing on this issue as moot. Id.

One month later, on July 19, 1996, OSM and Pittston entered into a comprehensive settlement of numerous disputes, including questions relating to Pittston's liability for unpaid AML fees related to mining conducted by Glory. On August 14, 1996, the Department of Justice agreed to the terms of the settlement. Thereafter, Pittston filed a motion with the Board which cited the above settlement and sought to have the instant appeal dismissed. See Motion to Dismiss dated October 21, 1996. While OSM supported this motion (see Motion in Support of Pittston's Motion to Dismiss, dated November 8, 1996), it was opposed by WVHC and NWF. See Petitioner's Statement in Opposition to Pittston's Motion to Dismiss. WVHC and NWF opposed dismissal of their appeal on the ground that it did not deal with the refusal of OSM to issue an NOV to Pittston with respect to past unpaid AML fees and was otherwise not final since, under its terms, it remained executory until full compliance by Pittston. Moreover, WVHC and

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8/ They did not, however, submit copies of these affidavits in the instant appeal. See note 5, supra. As explained below in the text of this opinion, this is not proper practice.

9/ We recognize that the decision actually purported to "dismiss" the appeals. An analysis of the decision, however, clearly establishes that, rather than dismissing the appeals, the Board affirmed the OSM decisions as "a reasonable exercise of the agency's discretionary authority." Id. at 69.

NWF asserted that, even if the agreement was treated as a full bar to the relief sought by them, the appeal should, nevertheless, not be dismissed since

> it raises an important legal question that is "capable of repetition, yet avoiding review," in view of the fact that OSM's practice of withholding the issuance of notices of violation pending the outcome of settlement negotiations with AML debtors will rarely, if ever, result in enforcement delay in excess of the time that this Board takes to adjudicate appeals that do not qualify for expedited review.

Id. at 2. Pittston has responded to appellants' assertions, noting that all issues relating to AML fee liability have been determined and that OSM would be in violation of the settlement agreement if it attempted to take any enforcement action directly against Pittston for Glory's AML fees. It argues that appellants have failed to establish any persuasive reason why the Board should proceed to decide issues which are essentially moot and, therefore, we do not reach the question of whether or not appellants have shown sufficient standing to proceed in this matter.

There are, therefore, two different pending motions seeking to have this appeal dismissed. For the reasons set forth below, we believe the appeal is properly dismissed on the ground that the issues involved are moot.

[1] Before turning to the mootness issue, however, we wish to comment on a practice which both appellants and OSM have indulged in during the course of this appeal, viz., the incorporation by reference of various submissions tendered in other cases pending before the Board. In every instance when this was done, the parties failed to provide copies of the documents so incorporated with their pleadings. This is not proper practice.

Indeed, the Board has expressly addressed this problem in the past. Thus, in Save Our Ecosystems, Inc., 85 IBLA 300 (1985), faced with a similar instance of incorporation by reference, the Board noted:

> Absent the entry by this Board of an order consolidating multiple appeals, each party is required to submit a complete set of documents for each appeal. Cases are assigned on a rotating basis to different panels of the Board and it is not unusual for totally different panels to be assigned similar appeals. In point of fact, not a single Judge in the instant case was a member of the panel which decided the appeal which appellants referenced. The net result of appellants' approach is that the Board must expend its time copying these documents or making other arrangements to review the referenced filings. * * *
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> If a party wishes to incorporate by reference previously filed documents, it must provide the Board with a copy of those

documents. Where this is not done, the Board will disregard such arguments.

Id. at 300-301 n.1.

Consideration of the instant appeal was beset by exactly the problems delineated above. Thus, different panels were assigned to review IBLA 93-152 and the instant case. By the time this case was reached for active review, IBLA 93-152 had already been decided. When the Board attempted to retrieve that case file from OSM, it was informed that OSM was unable to locate the original file. While the Board was provided with copies of most of the substantive pleadings, it was not provided with copies of the individual affidavits submitted by WVHC and NWF in that proceeding. While the inability of the Board to review affidavits does not adversely affect its ability to decide the question of mootness, it might impact on any determination as to appellants' standing to pursue the instant appeal. In light of the foregoing, we wish to caution the parties to this appeal that a similar failure to submit incorporated material in the future may well result in the summary rejection of the arguments involved.

[2] Insofar as the motion to dismiss the appeal on the ground that it is moot is concerned, we note a number of relevant facts. First of all, to the extent that appellants had challenged OSM's interpretation of and its actions taken in response to the court injunction in Pittston v. Lujan, supra, we note that this issue was not only previously raised by appellants in IBLA 93-152, but it was decided adversely to their claims in West Virginia Highlands Conservancy, supra. And, to the extent that appellants' allegations in the instant appeal relate specifically to Pittston's asserted failure to tender AML fees associated with Glory's operations, we note that this matter has been definitively settled 10/ by OSM and Pittston, with the concurrence of the Department of Justice.

There can be no question but that the specific issues involved in this appeal are, indeed, now moot. Appellants, however, seek to have this Board decide the substance of the appeal on the ground that the issue involved, which they characterize as the validity of OSM's practice of withholding issuance of an NOV for unpaid AML fees while negotiations are on-going with the company which allegedly owes these fees, is one which is "capable of repetition yet evading review." See, e.g., Colorado Environmental Coalition, 108 IBLA 10 (1989); Yuma Audubon Society, 91 IBLA 309 (1986). Yet, even if this issue were capable of repetition while avoiding review, the fact of the matter is that this is not the issue which appellants raised

10/ While appellants have suggested that the settlement is somehow not final, we agree with Pittston's analysis that, on the contrary, the settlement fully covers all issues involved herein related to AML fees and, upon the payment of the amounts specified therein (subject only to any possible controversy related to whether AML fees should be collected on a raw coal rather than clean coal basis), totally discharges any liability for AML fees related to Glory's operation which Pittston might have.

before the CFO. Notwithstanding their efforts to recast their complaint on appeal, the fact of the matter is that, before the CFO, they did not seek issuance of an NOV directly to Pittston based on AML deficiencies arising from the Glory operations. Rather, they sought both to have Pittston permit blocked for these deficiencies and, by doing so, directly raised the issue of OSM's interpretation of the injunction in Pittston v. Lujan, supra, 11/ and, alternatively, sought to have OSM proceed under 30 U.S.C. ' 1271(b) (1994) to take over state enforcement with respect to AML fees and permit blocking.

Moreover, we note that there is a considerable question as to appellants' standing to raise the issue of OSM's actions vis-a-vis collection of AML fees. As noted above (see note 6, supra), the sites which Glory mined are not, themselves, eligible for the disbursement of AML funds and, therefore, any individualized impact which appellants' members may have suffered from mining at those sites would not directly relate to whether or not Glory (or Pittston) tendered the requisite fees. And, insofar as appellants allege an interest in the environment and the proper enforcement of the laws, we would point out that this generalized interest has been held by this Board to be an insufficient basis on which to predicate findings of standing. See, e.g., Ernest Back, 135 IBLA 246, 248 (1996); Colorado Open Space Council, 109 IBLA 274, 280 (1989); Save Our Ecosystems, Inc., supra.

Finally, we note that the mere fact that an issue is capable of repetition is not preclusive of a dismissal for mootness unless it can fairly be said that the issue will continue to avoid review. See, e.g., Oregon Cedar Products, 119 IBLA 89 (1991); In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (1990). Even had appellants properly raised the question of the propriety of OSM's failure to issue an NOV for failure to tender requisite AML fees and clearly shown standing to appeal, they have failed to establish that this issue would be evasive of future review. Thus, those cases in which the Board has found that a likelihood of review avoidance might exist invariably involve situations in which the action challenged proceeded during the pendency of an appeal and, given the practical exigencies of the matters at issue, would likely do so in any future challenge. See, e.g., Coalition for the High Rock/Black Rock Emigrant Trail National Conservation Area, 147 IBLA 92, 94-95 (1998). Herein, appellants challenge non-action by OSM and their generalized complaint that this non-action would never be subject to timely review must be viewed with skepticism.

In view of the foregoing, we agree with Pittston and OSM that this appeal is properly dismissed on the grounds of mootness.

11/ In this regard, we would note that, to the extent that appellants have challenged OSM's interpretation of the injunction in Pittston v. Lujan, supra, the likelihood of recurrence seems extremely remote, since the injunction has been dissolved. See Order of April 23, 1996, CA-91-6-A, Pittston v. Babbitt (4th Cir.).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the appeal is dismissed.

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James L. Burski
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge